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No. 82-1845

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF COLORADO DISTRICT ATTORNEYS COUNCIL, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

On the defendant's motion to suppress evidence seized pursuant to search warrant, when the issue before the court is the credibility of the informant, rather than the affiant, does the trial court's order requiring the prosecution to name the confidential informant go beyond Fourth Amendment requirements?

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CITATION TO OPINION BELOW
People v. Nunez,
658 P.2d 879 (Colo. 1983)

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by counsel for the parties, and letters of consent of the

parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The Colorado District Attorney's Council is a separate legal entity comprised of members of the District Attorney's Offices in the twenty-two Colorado Judicial Districts.

The Council provides programs of education and training, publications, and administrative assistance to the various District Attorneys' Offices in the State of Colorado. These programs are intended to implement the Council's goal of promoting, fostering, and encouraging an effective administration of justice in Colorado and helping to ensure the safety of the public and the protection of the constitutional rights of accused persons.

Because it is an association of prosecuting attorneys, the Council is well aware of the problems faced by state and federal law enforcement officers in their daily efforts to deal with an increasing crime rate. Specifically, as relates to this case, the Council is aware that the drug problem, with the related involvement of countless burglaries, robberies, thefts and other crimes of violence, is ever increasing in intensity and that the vast majority of prosecutions of persons "pushing" sales of narcotics and other controlled substances are made possible because of use by the police of information furnished by confidential informers. Without confidential informants, enforcement of the criminal law in the field of narcotics would be greatly impaired.

The position of the Council is that the rule applied by the trial court and the

Colorado Supreme Court in the case at bar goes beyond the dictates of the Fourth Amendment and misapplies the holdings of this Court. Further, the rule nullifies the qualified privilege of the confidential informant, thus greatly impeding law enforcement efforts.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Colorado has mistakenly construed the decisions of this Court which relate to confidential informants and has extended such decisions beyond the scope of the Fourth Amendment.

The Court has expressly recognized a limited privilege on the part of the government to withhold the name of a confidential informant in order to facilitate effective law enforcement. The decision of the Colorado Supreme Court vitiates this privilege by permitting an accused, by attacking the veracity of the

informant, to obtain the name of the informant.

The Supreme Court of Colorado failed to recognize the crucial distinction, recognized by this Court, between disclosure of the informant's name for purposes of trial and disclosure of the informant's name for purposes of a suppression hearing.

The result reached by the Colorado Supreme Court is not mandated by the Fourth Amendment because no state action is involved; no unlawful police conduct is deterred since none occurred; and this Court's preference for a warrant is ill-served.

ARGUMENT

THE COLORADO SUPREME COURT'S DECISION IN THIS CASE MISAPPLIES THIS COURT'S DECISIONS IN THE AREA OF CONFIDENTIAL INFORMANTS, REACHES A CONCLUSION WHICH GOES BEYOND THE MANDATE OF THE FOURTH AMENDMENT, AND VITIATES THE QUALIFIED PRIVILEGE OF A CONFIDENTIAL INFORMANT.

In the case at bar, the trial court at a suppression hearing ordered the prosecution to reveal the name of a confidential informant who had given information used in obtaining a search warrant. This order was based on testimony by the defendant that conflicted with information obtained from the confidential informant. The veracity of the affiant police officer was not at issue, only the veracity of the informant. The Colorado Supreme Court affirmed the trial court's order. People v. Nunez, 658 P.2d 879 (Colo. 1983). We submit that when only the veracity of the informant is at issue, no state action is involved and the Fourth Amendment is not implicated.

As set forth by this Court:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that

> law. [citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Roviaro v. United States, 353 U.S. 53, 60.

The extremely adverse consequences to law enforcement of disclosing the identity of confidential informers is illustrated by the opinion in State v. Burnett, 42 N.J. 377, 201 A.2d 39 from which we quote at pertinent length:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the

> routine demand would have to be routinely granted. The result would be that the State could use the informant's information only as a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime on that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. (Emphasis supplied.) The basic rule protecting his identity rests upon that belief.

The foregoing quotation was set forth at length, and approved by this Court in McCray v. Illinois, 386 U.S. 300, 306-307.

While recognizing the importance of an informer's privilege, this Court has also recognized that this privilege is not absolute. In Roviaro, this Court held that identity of the informer must be disclosed whenever the informer's testimony may be helpful to the defense of the accused. Roviaro, unlike the case at bar, involved a confidential informant who was an "eye or

ear witness" and thus potentially a witness at trial.

This Court in McCray, pointed to the crucial difference between the informant's privilege when the informant is a potential witness at trial and the informant's privilege when the informant has only given information upon which to base a search warrant. This Court held that it was unwilling to impose any absolute rule requiring disclosure when the informant is a potential witness at trial and much less so "where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake." 386 U.S. at 311.

In Nunez, the Colorado Supreme Court relied heavily on its prior decision of People v. Dailey, 639 P.2d 1068 (Colo. 1982). Dailey like Nunez involved the disclosure of a confidential informant for suppression hearing purposes not for the purposes of a trial on the merits. In

Dailey, the Colorado Supreme Court applied the Roviaro balancing test, a test formulated to determine when the truthfinding process of a trial on the merits mandates that a confidential informant's name be disclosed. The court ignored the critical distinction set forth in McCray, between disclosure for purposes of the truthfinding function and disclosure for purposes of a suppression hearing, the results of which often thwart the truthfinding function.

The Colorado Supreme Court in the case before this Court imposes what for all practical purposes is an absolute rule requiring disclosure of an informant at a preliminary proceeding where the issue is merely one of probable cause for search and seizure.

Franks v. Delaware, 438 U.S. 152, dealt with the issue of whether a defendant has the right, under the Fourth and

Fourteenth Amendments, to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. The Court held that the Fourth Amendment gives a defendant the right after an appropriate showing to challenge "the deliberate falsity or reckless disregard," but "only that of the affiant, not of any nongovernmental informant." 438 U.S. at 171.

The Colorado Supreme Court in the instant case, by extending veracity hearings to challenges of the truthfulness of the informant not the police officer-affiant, has granted rights to the defendant which are beyond the scope of the Fourth Amendment and serve no recognized Fourth Amendment purpose.

This Court has long recognized that the impact of the Fourth Amendment is on the regulation and control of government action. In Burdeau v. McDowell, 256 U.S.

465, certain papers belonging to a private individual were stolen by another private individual and were ultimately given to the United States Department of Justice. The Court held that the Fourth Amendment "was not intended to be a limitation upon other than governmental agencies" and does not provide a redress for wrongs done by private individuals. 256 U.S. at 475.

In the Nunez case, no evidence was presented, nor even allegation made, that the police officer-affiant either lied or recklessly disregarded the truth in preparing the affidavit for the search warrant. Indeed, the evidence was scant that the informant might have lied. Thus in Nunez, no improper state action was alleged and the decision in Nunez goes beyond the dictates of the Fourth Amendment.

Amicus emphasizes that the Nunez result, i.e., predicating any decision at a

suppression hearing on the issue of whether an informant may have lied, serves no recognized Fourth Amendment purpose.

The exclusionary rule, by excluding in a criminal prosecution evidence obtained in violation of a defendant's Fourth Amendment rights, was designed to serve one primary purpose: to deter unlawful police conduct. Stone v. Powell, 428 U.S. 465.

In evaluating the effectiveness of this justification for the exclusionary rule as applied to the facts of this case, amicus respectfully directs this Court's attention to language from one of the many pertinent decisions of this Court, Michigan v. Tucker, 417 U.S. 433, 447.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a

> greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Clearly any exclusion of evidence predicated on the veracity of a confidential informant cannot serve a deterrent purpose where there is no allegation nor evidence that the affiant lied or was reckless in relying on the informant's information.

In its recent decision of Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, this Court abandoned the "two-pronged test" established in Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410, for determining whether an informant's tip establishes probable cause for issuance of a warrant and adopted a totality of the circumstances analysis.

Significantly Gates involved an anonymous informant and as this Court stated:

> [T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable ... While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not. 103 S.Ct. at 2332.

The rule adopted by Nunez would certainly leave no place for anonymous informants. If questioning the veracity of an informant leads to an order for disclosing that informant, an anonymous informant could never be used. At a minimum there is a tension between Gates and the case now before this Court.

Also pertinent to the Court's inquiry is the following language from Gates:

> If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or

> search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." [Citations omitted.] 103 S.Ct. at 2331.

We submit that the "scrutiny" given the warrant in the instant case might do the same type of damage to this Court's expressed preference for the warrant requirement.

CONCLUSION

The amicus urges, for the reasons stated in this brief and supported by the record, that the Colorado Supreme Court misapplied this Court's decisions in the area of confidential informants and reached a conclusion not in accord with the Fourth Amendment.

The result reached by the Colorado Supreme Court goes beyond the purposes of the Fourth Amendment, which is intended to

regulate governmental conduct and not the conduct of private individuals.

Most importantly, the decision of the Colorado Supreme Court emasculates the qualified privilege of a confidential informant by allowing an accused, who offers any evidence, to obtain the name of an informant -- even though, as in this case, no governmental action has been questioned. This result will severely impede law enforcement efforts.

WHEREFORE, amicus supports the petitioner's request for the Court to reverse the decision of the Supreme Court of Colorado in People v. Nunez, 658 P.2d 879 (Colo. 1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 16th day of November, 1983, I placed in the United States Mail, postage prepaid and properly sealed and addressed, 3 copies each of the foregoing Brief of Amicus Curiae to the parties of record in this case.

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